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11

12 UNITED STATES DISTRICT COURT

13 FOR THE CENTRAL DISTRICT OF CALIFORNIA

14 UNITED STATES OF AMERICA,

15 Plaintiff,

16 v.

17 JIM SHENG LEE,

18 Defendant.
19

No. CR 15-701-ODW

GOVERNMENT'S OPPOSITION TO
DEFENDANT'S MOTION TO BE PLACED IN
HOME CONFINEMENT FOR THE REMAINDER
OF HIS SENTENCE

20 Plaintiff United States of America, by and through its counsel
21 of record, the United States Attorney for the Central District of
22 California and Assistant United States Attorney Karen I. Meyer,
23 hereby files this opposition to defendant's motion to substitute
24 remaining sentence of imprisonment with home confinement pursuant to
25 18 U.S.C. § 3582.

26 This opposition is based upon the attached memorandum of points
27 and authorities, the files and records in this case, and such further
28 evidence and argument as the Court may permit.

1 Dated: April 20, 2020

Respectfully submitted,

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 It is unclear what relief defendant's motion seeks. Decisions
4 regarding placement in home confinement are governed by 18 U.S.C.
5 § 3621(b), a provision that defendant does not cite. Further, home
6 confinement decisions reside exclusively within the discretion of the
7 Bureau of Prisons ("BOP") and are unreviewable by this Court. In
8 contrast, defendant cites to 18 U.S.C. § 3582, a provision governing
9 compassionate release, or permanent release from custody, a remedy
10 defendant does not seek. Section 3582 does not govern decisions
11 regarding home confinement.

12 Regardless, defendant's motion should be dismissed. Under the
13 statute governing decisions regarding home confinement, defendant's
14 motion for transfer to home confinement should be dismissed because
15 the Court lacks jurisdiction over the placement of inmates once they
16 are sentenced and in the custody of the Bureau of Prisons. Under the
17 compassionate release statute, defendant's motion should be dismissed
18 because defendant has failed to comply with the mandatory exhaustion
19 requirements of 18 U.S.C. § 3582. Even if the Court were to consider
20 defendant's request, defendant's criminal history and previous
21 release on home confinement for a prior federal offense show him to
22 be ill-suited to abide by any terms of home confinement.

23 **II. STATEMENT OF FACTS**

24 **A. Defendant's Crimes and Sentence**

25 Defendant conspired with co-defendants Jian Sheng Tan ("Tan")
26 and Hua Leung ("Leung") to launder money by providing a cashier's
27 check to a confidential source ("CS") in exchange for cash that
28

1 defendant believed was the proceeds of drug money. In exchange,
2 defendant received a money laundering fee from the CS.

3 On August 18, 2017, defendant pled guilty pursuant to a plea
4 agreement to both counts of a two-count Indictment. (PSR ¶ 1.)
5 Specifically, defendant was convicted of conspiring to launder
6 monetary instruments, in violation of 18 U.S.C. § 1956(h), and
7 laundering monetary instruments, in violation of 18 U.S.C.
8 § 1956(a)(3)(B). (PSR ¶¶ 2, 3.) On June 3, 2019, this Court
9 sentenced defendant to a custodial term of 36 months. (CR 263.)

10 According to the PSR, prior to the instant offense, defendant
11 had two prior federal fraud convictions, one out of this district.
12 The first was a wire fraud conviction pursuant to 18 U.S.C. § 1343
13 out of the district of Nevada. (PSR ¶ 48.) On December 4, 2000,
14 defendant was sentenced to three years' probation and six months of
15 home confinement. (PSR ¶ 48) (emphasis added.) In this district, in
16 2003, defendant was sentenced to three years' probation for pleading
17 guilty to violating 18 U.S.C. § 1014, false statement to a financial
18 institution. (PSR ¶ 49.) The instant offense is defendant's third
19 federal conviction for a financial fraud crime.

20 **B. Incarceration and Projected Release Date**

21 Defendant is currently serving his sentence at Lompoc USP.
22 Defendant only began serving his three-year sentence on November 1,
23 2019. His projected release date is May 21, 2022. Thus, defendant
24 has served only a little over five months of his 36-month sentence.

25 **C. Defendant's Current Motion**

26 On April 13, 2020, defendant sent a letter to the FCC Lompoc
27 Warden requesting a transfer to home confinement pursuant to the
28

1 CARES Act. (Mot., Ex. 1.) Defendant filed the instant motion three
2 days later, on April 16, 2020.

3 In his letter to the Warden, defendant argues that his remaining
4 term of incarceration should be transferred to home confinement
5 because he has a "history of coronary artery disease" with stent
6 placement in July 2019 after suffering a heart attack. (Mot., Ex. 1,
7 at 1.) He also advised of the medications he is currently taking,
8 including Plavix, aspirin and Atorvastatin.¹ He further stated that
9 his condition necessitates an hour of exercise a day and a healthy
10 diet. (Id.) In addition to his letter, defendant included the
11 hospital records documenting his heart attack in July 2019, his one
12 night stay in the hospital, and his discharge instructions, including
13 medications. (Mot., Ex. 2.)² Defendant seeks home confinement based
14 on his stated increased risk for serious effects from the coronavirus
15 if infected. (Mot. Ex. 1, at 1.)

16 **D. The Bureau of Prisons' and Congress's Response to COVID-19**

17 BOP has taken aggressive steps to protect inmates' health and to
18 resist the spread of COVID-19. "[M]aintaining safety and security of
19 BOP institutions is [the BOP's] highest priority." BOP, Updates to
20 BOP COVID-19 Action Plan: Inmate Movement (Mar. 19, 2020), available
21 at https://www.bop.gov/resources/news/20200319_covid19_update.jsp.
22 Thus, the BOP Director recently emphasized that the "response [to
23 COVID-19] is the Bureau's top priority." BOP, Statement from BOP
24 Director (Mar. 26, 2020) (Statement from BOP Director), available at
25
26

27 ¹ It is government counsel's understanding that Plavix and
28 aspirin are blood thinners, and Atorvastatin treats high cholesterol.

² Some of these medical records contain redactions.

1 [https://www.bop.gov/resources/news/20200326_statement_from_director.j](https://www.bop.gov/resources/news/20200326_statement_from_director.jsp)
 2 [sp](https://www.bop.gov/resources/news/20200326_statement_from_director.jsp).

3 The BOP has never underestimated the threat of infectious
 4 disease. To the contrary, the BOP has had a Pandemic Influenza Plan
 5 in place since 2012. Id.; BOP, Pandemic Influenza Plan---Module 1:
 6 Surveillance and Infection Control (Oct. 2012), available at
 7 https://www.bop.gov/resources/pdfs/pan_flu_module_1.pdf. That
 8 protocol establishes a six-phase framework requiring BOP facilities
 9 to begin preparations when there is first a "suspected human outbreak
 10 overseas." Id. at i (emphasis added).

11 At extremely early stages, the Pandemic Influenza Protocol
 12 requires BOP facilities to ensure inmates' access to soap, to train
 13 them on hand-hygiene practices, and to ensure adequate infection-
 14 control supplies. Id. at 9. For every phase thereafter (from
 15 preliminary preparation, to a response to active pandemic, to
 16 recovery), it includes detailed procedures required of every BOP
 17 facility. Id. at 9-11. These include policies for creating "social
 18 distance" and for requiring "frequent environmental cleaning of
 19 'high-touch' surfaces." Id. at 2-3, 6. Facilities must follow
 20 protocols on how to identify sick inmates, track their interactions,
 21 and quarantine the exposed. Id. at 4-5.

22 The BOP implemented its Pandemic Influenza Protocol in January
 23 2020, modified as a COVID-19 Action Plan. BOP, Action Plan Phase V
 24 (Mar. 31, 2020) ("Action Plan Phase V"), available at
 25 https://www.bop.gov/resources/news/20200331_covid19_action_plan_5.jsp
 26 In Phase 1 of that plan, the BOP began developing policies in
 27 consultation with the Centers for Disease Control. See BOP, COVID-19
 28 Action Plan: Agency-Wide Modified Operations (March 13, 2020) ("BOP

1 Action Plan"), available at

2 https://www.bop.gov/resources/news/20200313_covid-19.jsp.

3 Since then, the BOP has serially escalated its response. BOP,
4 Bureau of Prisons Update on COVID-19 (Mar. 24, 2020), available at
5 [https://www.bop.gov/resources/news/pdfs/20200324_bop_press_release_co](https://www.bop.gov/resources/news/pdfs/20200324_bop_press_release_covid19_update.pdf)
6 [vid19_update.pdf](https://www.bop.gov/resources/news/pdfs/20200324_bop_press_release_covid19_update.pdf). On March 13, the BOP moved to Phase 2 of its
7 Action Plan, taking steps to "mitigate the spread of COVID-19" in
8 prisons, for the protection of both inmates and staff. See BOP
9 Action Plan, supra. The BOP suspended social and legal visits,
10 curtailed inmate movement, established enhanced screening procedures
11 for inmates and staff, and curtailed staff travel. Id. Consistent
12 with the Pandemic Flu Protocol, facilities adopted "modified
13 operations"---including staggered meal and recreation times---to
14 promote social distancing. Id. Just five days later, the BOP
15 escalated to Phase 3--taking additional steps, including ensuring
16 that "all cleaning, sanitation, and medical supplies" had been
17 inventoried and were adequately stocked. Id.

18 Phases 4 and 5 followed in late March; Phase 6 followed in mid-
19 April. Beginning March 26, the BOP required all newly admitted
20 inmates to be quarantined or isolated for a minimum of 14 days "or
21 until cleared by medical staff." See Action Plan Phase V, supra. On
22 April 1, the BOP instituted a nationwide lockdown. Id. For at least
23 a two-week period, "inmates in every institution will be secured in
24 their assigned cells/quarters to decrease the spread of the virus."
25 Id. The BOP has also "significantly decreas[ed] incoming movement."
26 Id. Modified operations will continue, for all institutions, until
27 at least May 18, 2020. Federal Bureau of Prisons, Bureau of Prisons
28 COVID-19 Action Plan: Phase Six (April 14, 2020), available at

1 https://www.bop.gov/resources/news/pdfs/20200414_press_release_action
2 [_plan_6.pdf](#).

3 Meanwhile, the BOP has continued working with the CDC,
4 confirming that its approach aligns with current CDC guidance for
5 COVID management in correctional facilities. Federal Bureau of
6 Prisons, Correcting Myths About BOP and COVID-19, at 1, available at
7 https://www.bop.gov/coronavirus/docs/correcting_myths_and_misinformat
8 [ion_bop_covid19.pdf](#) ("Correcting Myths"). Currently, BOP medical
9 staff are "conducting rounds and checking inmate temperatures at
10 least once a day"--twice a day where inmates are quarantined or in
11 isolation. Id. All BOP staff and inmates have been issued cloth
12 masks to wear on a daily basis--with staff required to wear masks,
13 gloves, and potentially gowns when dealing with isolated and
14 quarantined inmates. Id. at 1, 3. "Cleaning supplies have been
15 provided to inmates," and the BOP has provided training on CDC best
16 practices regarding disease transmission and prevention (including
17 sanitation). Id. at 2. Common areas are sanitized multiple times a
18 day. Id. at 3.

19 The gravity and severity of these measures reflect BOP's
20 commitment to fighting COVID-19 and protecting inmates. Nonetheless,
21 the BOP has not been immune from the pandemic. At Lompoc, a total of
22 54 inmates and 27 staff members have been infected, with 1 inmate
23 death. BOP, COVID-19 Coronavirus (updated daily at 12pm Pacific),
24 available at <https://www.bop.gov/coronavirus/index.jsp> (last visited
25 April 20, 2020). But in response to this outbreak, the Bureau of
26 Prisons has instituted an aggressive set of protocols to reduce
27 further infections. April 17, 2020 Memorandum re Enhanced COVID-19
28 Mitigation Measures (Exhibit 1). Among other measures, the wearing

1 of BOP-provided masks is now mandatory for all inmates, each inmate
 2 will have access to their disinfectant and paper towels, and use of
 3 phones and computers without legal need is prohibited. Id.

4 Infected inmates are isolated from fellow inmates and receive
 5 medical treatment. BOP, COVID-19 Coronavirus (updated daily at 12pm
 6 Pacific), available at <https://www.bop.gov/coronavirus/index.jsp>.

7 "Inmates whose conditions cannot be managed within the institution
 8 are sent to the local hospital[.]" Correcting Myths, supra, at 6.

9 While inmate infection (and certainly death) at Lompoc are of concern
 10 (and in the case of death, tragic), the numbers of infected inmates
 11 should be considered low in light of Lompoc's total population in the
 12 U.S. Penitentiary of at least 982 inmates.

13 **III. ARGUMENT**

14 **A. The Bureau of Prisons Has Sole Authority to Determine 15 Placement Decisions**

16 Defendant has requested that the Warden at Lompoc transfer him
 17 to home confinement to serve out the remainder of his 36-month
 18 sentence.³ Whatever decision the Warden reaches regarding
 19 defendant's request is not reviewable by courts. See generally 18
 20 U.S.C. § 3621(b) (precluding judicial review of BOP placement
 21 decisions); Reeb v. Thomas, 636 F.3d 1224, 1226-28 (9th Cir. 2011)
 22 (courts lack jurisdiction to review BOP's placement decisions under

24 ³ The BOP is "urgently reviewing all inmates" to determine their
 25 eligibility for home confinement, increasing resources to "review and
 26 make appropriate decisions as soon as possible." Federal Bureau of
 27 Prisons, Home Confinement (Apr. 5, 2020) ("BOP, Home Confinement"),
 28 available at https://www.bop.gov/resources/news/20200405_covid19_home_confinement.jsp.
 Inmates "do not need to apply to be considered[.]" Id. "The
 Department has also increased resources to review and make
 appropriate determinations as soon as possible." Correcting Myths,
supra, at 6.

1 18 U.S.C. §§ 3622-24); United States v. Grass, 561 F. Supp. 2d 535,
2 537 (E.D. Pa. 2008) (same).

3 In fact, courts may not modify a sentence once it is imposed
4 unless expressly permitted by statute or Rule 35 of the Federal Rules
5 of Criminal Procedure. United States v. Garza, 2020 WL 1485782*1
6 (S.D. Cal. March 27, 2020) citing United States v. Penna, 319 F.3d
7 509, 511 (9th Cir. 2003). Rule 35 does not apply here, and the
8 provisions governing home confinement decisions vest authority over
9 the placement of inmates once they are sentenced solely with the
10 Bureau of Prisons.

11 All placement determinations, including placement on home
12 confinement, are made under 18 USC § 3621(b). See 18 U.S.C.
13 § 3624(c)(6)(A); see also Sacora v. Thomas, 628 F.3d 1059, 1062 (9th
14 Cir. 2010). As part of the First Step Act ("FSA"), the following
15 sentence was added to the end of paragraph § 3621(b):
16 "Notwithstanding any other provision of law, a designation of a place
17 of imprisonment under this subsection is not reviewable by any
18 court." 18 U.S.C. § 3621(b). Even before the passage of the FSA,
19 the Ninth Circuit had ruled that a Court may not review the BOP's
20 discretionary placement decisions made pursuant to either §§ 3621 and
21 3624. Reeb, 636 F.3d at 1226-28 (reviewing BOP's individualized
22 placement decisions would be contrary to the "plain language" of
23 § 3625 exempting such placement decisions from judicial review); see
24 also, Brown v. Sanders, 2011 WL 4899919, at *2 n.3 (C.D. Cal. Sept.
25 1, 2011) ("Although Reeb involved a determination regarding [RDAP] as
26 opposed to a CCC or home detention, the difference is immaterial as
27 the RDAP determination is also made pursuant to § 3621."), aff'd sub.
28 nom Brown v. Ives, 543 F. App'x 636 (9th Cir. 2013). "While a judge

1 has wide discretion in determining the length and type of sentence,
 2 the court has no jurisdiction to select the place where the sentence
 3 will be served. Authority to determine place of confinement resides
 4 in the executive branch of government and is delegated to the Bureau
 5 of Prisons." United States v. Ceballos, 671 F.3d 852, 855 (9th Cir.
 6 2011) (citing United States v. Dragna, 746 F.2d 457, 458 (9th
 7 Cir.1984) (per curiam) (citations omitted); see also United States v.
 8 Williams, 65 F.3d 301, 307 (2d Cir.1995) (same).

9 Because Congress has exempted all BOP placement decisions,
 10 including placement on home confinement, from judicial review, this
 11 Court lacks jurisdiction to grant defendant's motion. Accordingly,
 12 defendant's motion should be dismissed.

13 **B. Defendant Has Failed to Satisfy the Exhaustion Requirement**
 14 **Found in 18 U.S.C. § 3582**

15 A compassionate-release motion is a request for a permanent
 16 reduction in a defendant's federal sentence. Despite citing to 18
 17 U.S.C. § 3582, defendant has not sought such relief. However, even
 18 assuming defendant had, a district court can evaluate a defendant's
 19 request for compassionate release only "after the defendant has fully
 20 exhausted all administrative rights" before the BOP, specifically:

21 after the defendant has fully exhausted all administrative
 22 rights to appeal a failure of the Bureau of Prisons to
 23 bring a motion on the defendant's behalf or the lapse of 30
 24 days from the receipt of such a request by the warden of
 25 the defendant's facility, whichever is earlier[.]

26 18 U.S.C. § 3582(c)(1)(A). This requirement is mandatory and
 27 jurisdictional. See generally Shaw v. Bank of America Corp., 946
 28 F.3d 533, 541 (9th Cir. 2019) ("statutorily-provided exhaustion
 requirements deprive the court of jurisdiction"); United States v.

1 Weidenhamer, No. CR016-01072-001-PHX-ROS, 2019 WL 6050264, at *2
2 (D. Az. Nov. 8, 2019) (citing cases).

3 Moreover, failure to exhaust cannot be excused. As the Third
4 Circuit recently held, § 3582(c)(1)(A) "presents a glaring roadblock
5 foreclosing compassionate release at this point. United States v.
6 Raia, --- F.3d ---, 2020 WL 1647922, at *2 (3d Cir. Apr. 2, 2020).
7 Given § 3582(c)(1)(A)'s plain language and purpose, the requirements
8 for filing a sentence reduction motion (had defendant in fact filed
9 such a motion), including that the defendant exhaust administrative
10 remedies or wait 30 days after filing a request with the warden, are
11 jurisdictional.

12 Exhaustion is particularly inexcusable for errors that an
13 administrative tribunal is competent to address. Barron v. Ashcroft,
14 358 F.3d 674, 678 (9th Cir. 2004). Indeed, "[g]iven BOP's shared
15 desire for a safe and healthy prison environment . . . strict
16 compliance with § 3582(c)(1)(A)'s exhaustion requirement takes on
17 added--and critical--importance." Raia, 2020 WL 1647922, at *2.
18 Here, the BOP is not merely competent to address defendant's
19 compassionate-release claims; it is uniquely qualified to do so.
20 Until the First Step Act, the BOP had exclusive authority to
21 adjudicate such claims. Notably, the First Step Act did not change
22 the factors relevant to compassionate release, only the procedures by
23 which a defendant can raise such claims. United States v. Ebbers,
24 --- F. Supp. 3d. ---, 2020 WL 91399, at *4 (S.D.N.Y. Jan. 8, 2020).
25 The BOP thus has immense expertise, both in (1) assessing the safety
26 and health of their inmates and (2) managing the administration of
27 their facilities. Exhaustion cannot--but also should not--be
28 excused. United States v. Eberhart, No. 13-CR-313-PJH-1,

2020 WL 1450745, at *2 (N.D. Cal. Mar. 25, 2020) (declining to excuse failure to exhaust COVID-19 compassionate-release motion); Neman, No. 14-521-JAK, ECF No. 863, at 6 (same).

Until 30 days have elapsed since defendant applied for compassionate release with BOP, this Court lacks authority to grant relief. 18 U.S.C. § 3582(c)(1)(1). The Court should thus dismiss defendant's motion.

C. Defendant Should Serve His Full Sentence in Custody Given the Failure of a Previously Imposed Term of Home Confinement Did Not Prevent Defendant From Committing a New Crime and Any Condition Is Being Well-Managed While in Custody

Even if the Court were to consider the motion, defendant's request should be denied because, contrary to defendant's assertion, defendant remains a danger to the community, and this danger outweighs any higher risk from coronary artery disease from which defendant may suffer in light of proper management of this condition while in custody.

BOP's release of inmates to home confinement must take into account, among other factors, the comparative risk to the inmate in home confinement in the identified location versus remaining in prison, the inmate's risk to the public through recidivism, and the availability of supervision during home confinement or risk to the public if supervision is lacking. In balancing these competing factors, defendant should remain in custody.

1. Defendant Has a Significant Criminal History, Including a Term of Home Confinement that Did Not Dissuade Him From Committing Crime

Defendant asserts that his conduct in prison proves that he is not a danger to the community. (Mot., Ex. 1, at 2) ("...I have been an outstanding prisoner because I have made no mistakes or violating

1 [sic] any prison rules."). But defendant's conduct in prison only
2 proves that when properly supervised in a custodial situation,
3 defendant can adhere to rules. However, when supervision is non-
4 existent and defendant is merely confined to his home, he fails to
5 learn from his mistakes and continues to engage in serious, criminal
6 activity - activity that has resulted in three separate federal
7 convictions.

8 2. Defendant's Condition Is Being Well-Managed

9 Defendant has provided hospital records only pertaining to his
10 one-night hospital stay for the heart attack he suffered in July
11 2019. To the extent his heart attack was the result of coronary
12 artery disease, it is unclear whether defendant continues to suffer
13 from the disease.⁴

14 To the extent defendant has coronary artery disease, defendant
15 asserts without support that he cannot maintain regular exercise or a
16 healthy diet to control his disease while in custody. BOP is
17 entitled to assess this claim administratively. Further, it appears
18 that defendant's condition is well-managed by BOP. As noted above,
19 defendant is currently on a regimen of blood thinners and cholesterol
20 medication that practically mirrors the medications prescribed to
21 defendant upon his release from the hospital in July 2019,⁵ and these

22
23 ⁴ This lack of clarity also demonstrates why BOP should have the
24 opportunity to evaluate defendant's request first, before any motion
25 is considered by this Court. BOP will have records associated with
defendant's health while in custody that they can use to evaluate his
condition in light of his request.

26 ⁵ Upon discharge from the hospital, defendant was prescribed the
27 following medications: (1) aspirin (blood thinner); (2) Copidogrel,
the generic form of Plavix (another blood thinner); (3) Atorvastatin
28 (to treat high cholesterol); and (4) Metoprolol Succinate (a beta
blocker to treat chest pain and high blood pressure). (Mot., Ex. 2,
at 15-16.) Out of these, the only medication defendant is not
receiving in custody is metoprolol succinate.

1 medications presumably lessen the severity of any coronary artery
2 disease from which he suffers. The insertion of a stent back in July
3 2019 would have opened any blockage that existed that caused or
4 contributed to the heart attack. Thus, it is not at all clear that
5 defendant is currently suffering from coronary artery disease that
6 places him at a higher risk of serious effects from COVID-19
7 infection.

8 **IV. CONCLUSION**

9 Defendant's motion for home confinement or compassionate release
10 should be dismissed. Even if the Court could reach the merits of
11 defendant's motion, the motion should be denied for the reasons set
12 forth above.